such that a valid agreement could not be made, the writing will be declared void. Such evidence must necessarily be of matters extrinsic to the instrument. It does not contradict a written instrument, it shows there is no valid instrument. *Gillespie* v. *Moon,* 2 Johns. Ch. 585. This rule is substantially conceded by the court when it says, "Though there may be at some time a mutual and innocent mistake as to mere quantity in a sale in gross of such magnitude as to enable the court to say it goes to the substance of the contract, and justifies relief by way of rescission," yet it does not think the present case is such as to call for its application. Is not a mistake as to seventy-two acres of land in a tract believed to contain only two hundred of sufficient magnitude to call for equitable relief? Had it been a deficiency instead of an excess could there be any doubt? Answers to these questions may probably be found in *Hull* v. *Watts,* supra. (See also *Paine* v. *Upton,* 87 N. Y. 327, 41 Am. Rep. 371, where executed contracts are considered, and *Belknap* v. *Sealey,* 14 N. Y. 143.) What are the equities of the situation? The result is to take away from the plaintiffs, without compensation, seventy-two acres of land, and invest the defendant with title to it—a result clearly not contemplated by the parties. A court of equity ought to be able to relieve from such a hardship. *Riegel* v. *American Life Ins. Co.,* 153 Pa. St. 134, 25 Atl. Rep. 1070, HUTCHINS' & BUNKER'S CAS. (2nd ed.) 221; *Allen* v. *Hammond,* 11 Pet. 63, 71. And though a contract of sale in gross covers a reasonable excess or deficiency it hardly seems just to extend it to such a material variance as there was in the present case. (*White* v. *Miller,* 22 Vt. 380; *Hendricks* v. *Mosely,* 11 Tenn. 73; *Morrison* v. *Hardin,* 81 Miss. 583, 33 So. Rep. 80; *Marvin* v. *Bennett,* 8 Paige 312, 321; *Southern Finishing & Warehouse Co.* v. *Ozment,* 132 N. C. 839, 44 S. E. Rep. 681; *Miller* v. *Craig,* 83 Ky. 623, 4 Am. St. Rep. 179; *Jacobs* v. *Revell,* [1900] 2 Ch. 858.)

THE PRIVILEGE OF A WITNESS TO REFUSE TO DISCLOSE TRADE SECRETS.—In this age of marvelous commercial development, it is not surprising that the courts should be called upon to determine to what extent, if at all, there resides in a witness, the privilege to refuse to disclose the ingredients of a secret formula, the mechanical construction of an invention, or the names of customers, expenses of a business, and other private information, which for want of a better name have been designated "trade secrets."

The question was before the court in the recent case of *Crocker-Wheeler Co.* v. *Bullock* (Dec., 1904), 134 Fed. Rep. 241, wherein it was held, COCHRAN, J., delivering the opinion, that a witness has a legal privilege to refuse to give testimony sought, or to produce documents called for, where such testimony or documents will disclose trade secrets, and where the evidence is irrelevant or otherwise inadmissible in the case. The principal action was at law for damages for breach of contract, and was pending in the Circuit Court of the United States for the District of New Jersey. This proceeding was an application by the plaintiff corporation for an attachment against the person of Joseph S. Neave, vice-president of the Bullock Electric Co., for contempt in refusing to produce certain account books of said Bullock company before

the clerk of the court in obedience to a subpoena duces tecum commanding him to do so. It was contended on behalf of the witness against the application for an attachment that the witness had a legal privilege to withhold the books called for.

The disclosure of the truth required of every witness in a judicial proceeding has been very aptly defined as "a debt which every man owes his neighbor, which he is bound to pay when called upon, and which, in his turn he is entitled to receive," and for centuries it has been recognized as a fundamental maxim that the public has a right to every man's evidence. This duty will, of necessity, at some time, involve a sacrifice of time and convenience, or it may be a disclosure of private matters, which, if the sole interest of the witness were consulted, would remain securely locked in his own breast. But public policy forbids that the dispensation of justice depend upon the will of one man, or set of men, and at the sacrifice of time and convenience, or perhaps, with pecuniary loss to the witness, he must testify unless his privilege to refuse is expressly and positively secured to him by statute or judicial decisions. "When the course of justice requires the investigation of truth, no man has any knowledge which is rightly private."

But the duty of the witness is by no means a unilateral one. In return for the right to call him at any time, the public owes a duty to the witness not to exact testimony when necessity does not demand it, nor in those cases where the benefit gained by exacting it would in general be less valuable than the disadvantage caused. We follow the court in quoting Lord Chancellor HATHERLY, in the case of *Moore* v. *Craven,* L. R. 7 Ch. App. 94, as follows: "The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery that can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the cause made by the plaintiff's pleadings and to what will be in issue at the hearing." In a recent work on Evidence, it is said, "In a day of prolific industrial invention and free economic competition it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitor and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This rule, and the necessity of guarding against it, may extend not merely to chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of possibly private nature, as the names of customers, the subjects and amounts of expenses and the like. Accordingly there ought to be, and there is, in some degree a recognition of the privilege not to disclose that class of facts, which, for lack of a better term have come to be known as 'trade secrets.'" WIGMORE, EVIDENCE, § 2212. As pointed out by the court in the principal case, the sole question is, Is the disclosure of trade secrets indispensable for the ascertainment of truth? and

the corollary, Is such disclosure relevant and admissible in evidence? If answered in the affirmative the question is proper and the privilege will not be recognized.

In *Lord Melville's Case,* and the statute subsequently enacted (46 Geo. III, chap. 37) the rule was settled in England against the right of a witness to refuse to give testimony where a pecuniary loss to the witness would result therefrom. And this rule is generally followed in the United States. *Bull* v. *Loveland,* 10 Pick. 9; *Baird* v. *Cochrane,* 4 S. & R. 397; *Lowney* v. *Perham,* 20 Me. 235; *Ward* v. *Sharp et ux.,* 15 Vt. 115. That the tests of relevancy and materiality govern the English courts in their decisions is evidenced by the following opinions: In *Mistouski* v. *Mandleberg and Co.,* 6 T. L. R. 207, the court said, "It is in the discretion of the court to compel answers to interrogatories and to order the inspection of documents which might disclose a trade secret." The evidence was held to be relevant and was admitted. In *Heugh* v. *Garrett,* 44 L. J. Ch. N. S. 305: "The court ought not to compel discovery of matters useless to the plaintiff for any purpose of the hearing which may be injurious to the defendant in case the plaintiff fails at the hearing." In *Ashworth* v. *Roberts,* L. R. 45 Ch. D. 623, "The plaintiff is entitled to deliver these interrogatories so long as they are not oppressive and so long as they do not compel the defendant to disclose his secret process." In *Badische Anilin und Soda Fabrik* v. *Levenstein,* L. R. 24 Ch. D. 156, the defendant objected to answering certain questions put to him on cross-examination for the reason that they would have the effect of causing him to disclose the secret process employed by him. The objection was sustained by the court, and the witness was given leave to refuse to answer the questions. In *Star Kidney Pad Co.* v. *Greenwood,* 3 Ont. R. 280, the action was upon a note given for the purchase price of some kidney pads. The defense was that the note was secured by fraud, and that the pads were in fact useless and of no curative value. To show these facts the defendant contended that he had the right to prove by the plaintiff the contents of the pads and that they were in that respect valueless. The court, however, held the evidence irrelevant and the defendant not entitled to discovery. See also: *The Don Francisco,* 31 L. J. Admr. N. S. 205; *Howe* v. *M'Kernan,* 30 Beav. 547; *Renard* v. *Levinstein,* 10 L. T. R. N. S. 94; *Carver* v. *Pinto Leite,* L. R. 7 Ch. App. 90, 96; *Great Western Colliery Co.* v. *Tucker,* L. R. 9 Ch. App. 376.

In America the decisions are not uniform. As early as 1860 the question came before the New York courts in the case of *Burnett* v. *Phalon,* 19 How. Pr. 530. The action was for the alleged invasion of the plaintiff's right to use a trademark. In estimating the damages, the witness refused to specify the materials of which the article "Cocaine" was composed, on the ground that the composition was secret, having a considerable pecuniary value to the plaintiff's firm and not known to the public. The referee declared the witness in contempt. The special term reversed the decree, which latter judgment was reversed by the higher court, which said: "But the Code adopts the principle of the bill of discovery, and allows the person to be examined against his interest, as well as to be examined on his own behalf." *Brooks* v. *McKinney,* 4 Scam. 309. In 1888, the question came before the federal court

in the case of *Moxie Nerve Food Co.* v. *Beach,* 35 Fed. Rep. 465, and the court, relying upon the argument in the case of *Tetlow* v. *Savournai,* 15 Phila. 170, 11 Weekly Notes Cases 191, where a rule for attachment against the plaintiff for his refusal to answer as to what ingredients entered into the composition of his powder was dismissed, said: "It must be admitted the question is not free from difficulty. I am strongly impressed that it would be inequitable to force the witness to make the disclosures called for, and therefore unless bound by authority, I must deny the motion. If these questions must be answered, every manufacturer will be at the mercy of anyone who desires to extort from him an account of his process, for an attempt to restrain an infringer would result in the disclosure of all that makes the invention valuable." In *In re Pac. Ry. Com'n.,* 32 Fed. Rep. 241, 254, the commission was held limited in its inquiries as to the interest of the directors in any other business, company, or corporation, to such matters as these persons may choose to disclose. To conclude this note, we quote from the case of *Dobson* v. *Graham,* 49 Fed. Rep. 17: "The plaintiff filed his bill charging infringement of his rights without having any positive knowledge upon the subject. He seems to have relied upon the chance of obtaining evidence to support the charge from the defendant and his workmen. Such a case is not entitled to the special favor of a court of equity. These secrets of his [defendant's] business, if they cover nothing unlawful are his property and as well entitled to protection as the rights secured by plaintiff's patent. If it were shown that these secrets are used as a cloak to cover an invasion of the plaintiff's rights, or if there was reliable evidence tending to show it, and justifying the belief that they are sound, the motions would be sustained. But there is no such evidence before us." *Stokes Bros. Mfg. Co.* v. *Heller,* 56 Fed. 297. The decision in the principal case is, we believe, clearly right and will have a tendency to settle the heretofore uncertain rules governing this justifiable privilege.

RIPARIAN OWNER'S TITLE TO CONTIGUOUS ISLANDS.—In *Webber* v. *Axtell* (1905), — Minn. —, 102 N. W. 915, an early patentee of land on the shore of a small lake and later patentees of an island opposite the first patentee's shore lots are in dispute over the title to the island. The lake in this case is about three and one-half miles long by one-half or three-fourths of a mile wide, and was meandered by the government surveyor in 1857, when the island was marked on the plat and indicated in the surveyor's notes as containing about two acres, though no actual survey of it was then made, nor was there any indication on the plat that it was reserved as a part of the public domain. It was about fifteen rods from the shore lots which plaintiff entered and patented under the homestead law, and it appears to have been claimed by him as part of his original grant for nearly twenty years, after which time the government caused it to be surveyed and conveyed to the present defendant's grantor. When the present action to recover the island was begun accretions had established a sand-bar between the island and the original patentee's shore lots, though there was no such connection between